STANDARD CHARTERED BANK MALAYSIA BHD

v.

TUNKU MUDZAFFAR TUNKU MUSTAPHA

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN YUNUS J
[ORIGINATING SUMMONS NO: S3-24-1700-02]
10 NOVEMBER 2004

LAND LAW: *Charge - Order for sale - Notice of default - Service of Form 16D on defendant - Whether governing provision for service s. 431(1)(c)(i) National Land Code or s. 9.33 Charge Annexure - Whether service had been effected on defendant - Whether originating summons a nullity - National Land Code, s. 431*

WORDS & PHRASES: *"Without prejudice to any other method of service …" - National Land Code, s. 431(1)*

This was a foreclosure action pursuant to s. 256 of the National Land Code ('the NLC') and O. 83 of the Rules of the High Court 1980 ('the RHC') by the plaintiff bank against the defendant. The plaintiff had granted an overdraft facility and a term loan facility ('the facilities') to the defendant, who charged his land to the plaintiff as security for the facilities. In the present originating summons, the plaintiff claimed that the defendant had defaulted in the repayment of the facilities. The plaintiff also submitted that it had served a notice of default known as a Form 16D notice ('Form 16D') on the defendant. The relevant issues requiring determination in the present case were: (i) whether the governing provision for the purpose of the service of Form 16D should be s. 431(1)(c)(i) of the NLC or s. 9.33(4) of the Charge Annexure ('s. 9.33(4)'); and (ii) whether the plaintiff had proved, on a balance of probabilities, that service of Form 16D had been effected on the defendant in accordance with the NLC.

Held (dismissing the action):

[1] This court was inclined to confine the whole of s. 431 of the NLC, including the qualifying phrase "Without prejudice to any other method of service …" only to service of documents mentioned in, and required to be served by, the NLC. If there are other provisions outside the provisions of the NLC and its subsidiary legislation (s. 9.33(4) is such a provision) that provides for the method of service of documents required

to be served by the NLC or its subsidiary legislation, such method being different from the methods prescribed by s. 431 of the NLC, then such provisions are null and void in so far as they relate to the method of service of such documents. A Charge Annexure cannot lawfully prescribe the method of service of Form 16D, let alone provide for a service 'deeming' provision, as can be found in s. 9.33(4) of the Charge Annexure. Even if it can do so, and assuming that the words "other method" in the qualifying phrase were to be given a wide interpretation, s. 9.33(4) still cannot be interpreted so as to apply to the service of Form 16D because the method of service of Form 16D is not specifically mentioned in s. 9.33(4). Therefore, to sum up, the governing provision for the purpose of the service of Form 16D is s. 431(1)(c)(i) of the NLC and not s. 9.33(4). (pp 125 e-g, 126 c-e & 127 a)

[2] The only evidence adduced by the plaintiff in order to prove the service of Form 16D on the defendant, which was its process server's statutory declaration, was vague and meaningless. The statutory declaration, by merely stating "… dengan meninggalkan surat dan Borang 16D tersebut di alamat di atas …", was only parroting the provision of s. 43(1)(c)(i) of the NLC. It was not only grossly insufficient and vague but also inappropriate for the process server to just state "meninggalkan" in the statutory declaration; it was unfair to the defendant. The process server should have furnished some meaningful information as to how the service was done, and only when such details were supplied in the affidavit of the process server would the defendant be in a proper position to rebut the plaintiff's claim as to service or to dispute the legality of the service. Likewise, only then would the court be in a position to make a proper finding on the issue as to whether or not there was in fact service, and if there were, whether it was effected in accordance with the law. (p 128 b-f)

[3] Service of Form 16D on the chargor is mandatory in law, and only upon due service of this notice can the follow-up proceedings under s. 256 of the NLC and O. 83 of the RHC be taken. Since there was no service of the said notice, the present originating summons was a nullity. (p 122 d)

Case(s) referred to:

Amanah Merchant Bank Bhd v. Lim Tow Choon [1994] 2 CLJ 1 SC ***(dist)***

Asia Commercial Finance (M) Bhd v. Regional Brilliance Sdn Bhd [2002] 3 CLJ 638 HC ***(dist)***

Kekatong Sdn Bhd v. Bank Bumiputra Malaysia Sdn Bhd [1998] 2 CLJ 266 CA ***(foll)***

Labels Specialist Industries Sdn Bhd v. Medal Sports (M) Sdn Bhd [1997] 3 CLJ 578 HC ***(foll)***

TA Securities Bhd v. Ng Yen Ling [2001] 1 CLJ 102 HC ***(dist)***

Legislation referred to:

Companies Act 1965, s. 350

National Land Code, ss. 242(1), 254, 256, 431, Forms 16A, 16B, 16D

Rules of the High Court 1980, O. 62 r. 4(1)(a), O. 83

For the plaintiff - Alvin Julian; M/s Paul Chong & Nathan

For the defendant - Gopi Seshadari; M/s Vicknaraj, RD Ratnam, Rajesh Kumar & Assoc

Reported by Suresh Nathan

JUDGMENT

Hishamudin Yunus J:

This is a foreclosure action pursuant to s. 256 of the National Land Code ('the NLC') and O. 83 of the Rules of the High Court 1980 ('the RHC').

I have dismissed this action with costs. I now give my grounds.

In November 1995 the plaintiff bank granted an overdraft facility of RM200,000 and a term loan facility of RM400,000 to the defendant. As a security for these facilities, the defendant charged his land in Kuala Lumpur known as H.S. (D) 39304 Lot PT 42511, Mukim Kuala Lumpur, to the plaintiff.

In the present originating summons of 19 April 2002, the plaintiff claims that the defendant has defaulted in the repayments of the facilities.

An action pursuant to s. 256 for the public sale of the charged property must begin with the service of a notice of default known as Form 16D on the chargor/defendant. This is required by s. 254 of the NLC. This section stipulates:

254. Service of default notice, and effect thereof.

(1) Where, in the case of any charge, any such breach of agreement as is mentioned in subsection (1) of section 253 has been continued for a period of at least one month or such alternative period as may be specified in the charge, the chargee may serve on the chargor a notice in Form 16D:

(a) specifying the breach in question;

(b) requiring it to be remedied within one month of the date on which the notice is served, or such alternative period as may be specified in the charge; and

(c) warning the chargor that, if the notice is not complied with, he will take proceedings to obtain an order for sale.

The plaintiff claims that it has served the Form 16D notice on the defendant. Service of the Form 16D notice on the chargor is mandatory. Only upon due service of this notice can the follow up proceedings under s. 256 and O. 83 be taken. If there is no service of the said notice, then, the subsequent proceedings (ie, the filing of the originating summons – as in the present case) against the chargor is null and void. This is made clear by the Court of Appeal in *Kekatong Sdn Bhd v. Bank Bumiputra Malaysia Sdn Bhd* [1998] 2 CLJ 261, where Gopal Sri Ram JCA said (at p. 283):

> But there is yet another matter that calls for attention. It has to do with the service of the notice in Form 16D upon the appellant. In our judgment the word "may" appearing in s. 431(1) of the Code is not merely directory. It is imperative. Our reasons for so holding are as follows:
>
> (1) The ownership of immovable property and all things appurtenant thereto is a very valuable right. It has been placed on a constitutional footing as a fundamental right by art. 13 of the Federal Constitution. Accordingly, any deprivation of immovable property must be in strict compliance of both substantial and procedural law.
>
> (2) The effect of an order for sale and the proceedings subsequent thereto, including the holding of a public auction, are designed to permanently deprive a registered proprietor of his land. It is therefore of utmost importance that such deprivation is undertaken in strict compliance of the law.

(3) The provisions in the Code that govern the enforcement of registered charges exist not only as a means of a lender recovering his money but also for the protection of the chargor. See, *Kimlin Housing Development Sdn. Bhd. v. Bank Bumiputra Malaysia Berhad & Ors* [1997] 3 AMR 2361. The court, by treating the service provision in s. 431(1) as mandatory would ensure that the protection given by the Code is not rendered illusory.

Applying what we apprehend to be the relevant principles to the facts of the present appeal we arrive at the following conclusions:

(1) The statutory demand by way of Form 16D was not served upon the appellant in the manner prescribed by the Code.We agree with the submission of Encik Narayanan for the appellant that cl. 16 of the annexure, which the learned judge relied upon, is, with respect, irrelevant in the present case. To recapitulate, that clause speaks of service at the appellant's registered office or at the "usual or last known place of business of the Chargor". However, in the present instance, there is no positive evidence to show that the original address was at any time the "usual or last known place of business" of the appellant. The mode of service prescribed by s. 431(1)(b) of the Code is in terms imperative and the respondent's failure to comply with that section vitiates the order for sale.

Now, s. 431 of the NLC prescribes the various methods as to how the Form 16D notice is to be served on the chargor. However, for the purpose of the present case, in the light of the manner of service allegedly adopted by the plaintiff, we are only concerned with that part of the provision that prescribes a particular mode of service, that is, service by leaving the Form 16D notice at the prescribed address of the defendant. This provision states:

431. Method of service.

(1) Without prejudice to any other method of service, a notice may be served on a person or body for the purposes of this Act:

(a) …

…

(c) by leaving the notice in a cover addressed to the person or body:

(i) at the person's usual or last known abode or place of business;

Do take note of the qualifying words:

Without prejudice to any other method of service …

in the above section. The effect of this qualification will be discussed shortly.

Now, Section 9.33 (4) of the Charge Annexure states:

> (4) Deemed Delivery:- Any notice or demand or certificate or request or communication to the Chargor shall be deemed to have been sufficiently or effectively given or made or delivered when delivered personally or left at any of the Chargor's address stated in section 9.33 [(2)] above …

(The correctness of the address (or addresses) of the defendant to be served is not disputed. So, I shall not to refer to section 9.33 (2) of the Annexure.)

A Charge Annexure is part of the Charge instrument. The Charge instrument is prescribed by s. 242(1) and Form 16A of the NLC (there is also a Form 16B charge, but we are not concerned with that type of charge (to secure the payment of annuity) in this case). The provision reads:

> **242. Form of charges.**
>
> (1) Every charge to secure the repayment of a debt, or the payment of any sum other than a debt, (in either case, whether the amount in question is to be paid as a lump sum or by instalments) shall be effected by an instrument in Form 16A.

Form 16A does not prescribe in detail what the Annexure is to contain. If we were to examine the Form 16A, we will note that at the bottom part of the form there is but a brief reference to the Annexure, and it merely states:

> [Schedule]
>
> ANNEXURE
>
> (…)
>
> (Provisions as to payment, rate of interest, [if any,] etc)

It is also important to note that there is nothing in the NLC, including Form 16A, that empowers the chargee to prescribe in the Charge Annexure as to how the Form 16D is to be served on the chargor.

It appears to me from the written submissions of both parties that there is a preliminary issue that I have to dispose first. That preliminary issue is: what should be the governing provision for the purpose of the service of the Form 16D in the present case: whether it should be s. 431(1)(c)(i) of the NLC; or whether it should be section 9.33(4) of the Charge Annexure?

The learned counsel for the plaintiff, in his written submission, is not clear on the issue and seems to suggest that both s. 431(1)(c)(i) of the NLC and section 9.33(4) of the Charge Annexure are applicable.

The learned counsel for the defendant, on the other hand, is rather forthright. He contends that the applicable provision on the issue of service of the Form 16D in the present case is only s. 431(1)(c)(i) of the NLC.

In embarking on this issue, I think I must begin with this inquiry: What does the qualifying phrase:

> Without prejudice to any other method of service …

in subsection (1) of s. 431 of the NLC, means? I must confess that I find some difficulty in interpreting this phrase; and with due respect to the legal draftsman, the provision should have been clearly drafted, in particular, the section should have been more precise as to what is meant by the words 'other method'. Do the words 'other method' mean other methods of service as prescribed elsewhere (if any) in the NLC, other than those prescribed by s. 431; or should the words be given a wider interpretation so as to also include such other methods of service as prescribed, not only by the NLC, but also by documents such as the Charge Annexure? In my judgment, I am inclined to confine the whole of s. 431, including the qualifying phrase:

> Without prejudice to any other method of service …

only to service of documents mentioned in, and required to be served by, the NLC, such as, for example, Form 16D. In other words, the words 'other method' are intended to refer only to other methods as prescribed elsewhere (that is to say, other than as prescribed in s. 431) within the NLC and its subsidiary legislation. The interpretation that I have adopted means that if there are other provisions outside the provisions of the NLC and its subsidiary legislation (and I hold that section 9.33(4) of the Charge Annexure is a provision outside the NLC and its subsidiary legislation) that provides for the method of service of documents required to be served by the NLC or its subsidiary legislation, such method being different from the methods prescribed by s. 431 of the NLC, then such provisions are null and void in so far as they relates to the method of service of such documents.

But in the first place, as a matter of law, can the Charge Annexure prescribe the manner as to the service of the Form 16D? In my judgment, considering:

(a) that since there is already a clear provision in the NLC, in the form of s. 431, as regards the manner notices (and 'notices' is widely defined by s. 430 of the NLC, and includes Form 16D) are to be served; and

(b) that there is nothing in the NLC (including Form 16A) that clearly authorizes the chargee to prescribe in the Charge Annexure the manner the Form 16D is to be served on the chargor,

I am of the view that a Charge Annexure cannot lawfully prescribe the method of service of the Form 16D, let alone provide for a service 'deeming' provision, as can be found in section 9.33(4) of the Charge Annexure.

Now, assuming that I am wrong in my above view and that, notwithstanding s. 431, a Charge Annexure can lawfully provide for the manner in which a Form 16D is to be served; and even assuming further in the alternative that the qualifying phrase:

> Without prejudice to any other method of service …

and, in particular, the words 'other method' were to be given a wide interpretation, so as to include also the methods of service as prescribed by section 9.33(4) of the Charge Annexure, still, in my view, section 9.33(4) of the Annexure cannot be interpreted so as to apply to the service of Form 16D. My reason for so holding is that the method service of Form 16D is not specifically mentioned in section 9.33(4). It is to be observed that section 9.33(4) only refers to:

> Any notice … to the Chargor …

Indeed, nowhere in the Charge Annexure is there any reference to Form 16D at all. Instead, what we do find in the Charge Annexure is section 9.33(1) providing (and in my opinion, section 9.33(4) must be read together with this section 9.33(1)):

> (1) Mode: Every notice … under this Charge …

Thus, the words:

> Any notice … to the Chargor …

in section 9.33(4) of the Charge Annexure must therefore be confined only to those notices mentioned in the Charge Annexure. To my mind, there have to be clear words in the provisions of the Charge Annexure before such provisions can be taken to have displaced the requirements as to the service of the Form 16D as prescribed by s. 431.

Therefore, to sum up, the governing provision for the purpose of the service of the Form 16D is s. 431(1)(c)(i) of the NLC and not section 9.33(4) of the Charge Annexure.

In any event, I think, for the purpose of the present case, particularly, considering the mode of service allegedly adopted by the plaintiff, considering the fact that the addresses of the defendant for the purpose of service are not disputed, and bearing in mind that the word 'left' (appearing in section 9.33(4) of the Annexure) and the word 'leaving' (appearing in s. 431(1)(c)(i) of the NLC) are from the same root word 'leave', the issue as to which of the two provisions is applicable, is rather academic. For, whichever provision is applicable (be it s. 431(1)(c)(i) of the NLC or section 9.33(4) of the Annexure), the issue is still the same: whether the words 'meninggalkan' in the statutory declaration of the plaintiff's process server can be accepted as proof of due service of Form 16D on the defendant.

The plaintiff claims that the Form 16D was served on the defendant on 3rd and 6 November 2000. The plaintiff's process server, one Zamri bin Abu Hassan, has on 9 November 2000 affirmed a statutory declaration pertaining to service. This statutory declaration is exhibited in the supporting affidavit of the plaintiff. The relevant paragraphs of the statutory declaration states:

> 2. Pada hari Jumaat, 3hb November, 2000 pada jam 11.05 pagi saya telah menyerahkan sepucuk surat dan Borang 16D yang bertarikh 31hb Oktober, 2000 kepada Tunku Mudzaffar Bin Tunku Mustapha (Penggadai tersebut) di No. 19, Persiaran Mewah, Bandar Tun Razak, Cheras, 56000 Kuala Lumpur dengan meninggalkan surat dan Borang 16D tersebut di alamat di atas yang merupakan alamat terakhir yang diketahui untuk Penggadai tersebut.
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> 3. Pada hari Isnis, 6hb November, 2000 pada jam 11.40 pagi saya telah menyerahkan sepucuk surat dan Borang 16D yang bertarikh 31hb Oktober, 2000 kepada Tunku Mudzaffar Bin Tunku Mustapha (Penggadai tersebut) di d/a Suite 8-16-1, Level 16, Plaza Raja Chulan, Peti Surat 16, No. 8, Jalan Raja Chulan, 50200 Kuala Lumpur dengan meninggalkan surat dan Borang 16D tersebut di alamat di atas yang merupakan alamat terakhir yang diketahui untuk Penggadai tersebut.

The defendant has in his affidavit denies receiving either the letter of 31 October or the Form 16D.

In my judgment, to repeat what has been stated earlier, service of the Form 16D notice on the defendant is mandatory for the purpose of s. 256 of the NLC. The burden of proof as to service of that notice is on the plaintiff; and the plaintiff has to prove service of the same on a balance of probabilities.

In the present case, has the plaintiff proved on a balance of probabilities that service of the notice has been effected in the manner required either by s. 431(1)(c)(i)?

In my judgment, the answer must be 'No'.

In the present case, the only evidence adduced by the plaintiff in order to prove service of the Form 16D on the defendant is its process server's statutory declaration. But in my view, the content of that statutory declaration is vague and meaningless. The statutory declaration, by merely stating:

> … dengan **meninggalkan** surat dan Borang 16D tersebut di alamat di atas … (emphasis added)

is only parroting the provision of s. 431(1)(c)(i). It is not only grossly insufficient and vague but is also inappropriate for the process server to just state 'meninggalkan' in the statutory declaration. Such an averment is unfair to the defendant. The process server must furnish some meaningful information as to how the service was done. In other words, the affidavit of service must elaborate as to what is meant by 'meninggalkan'. The affidavit of service must state, for example, whether the notice was left by the process server in the defendant's letterbox; or at some other part of the defendant's premises. Or, whether the process server handed it to the defendant's secretary or to some other staff of the defendant; or whether it was left with a member of the defendant's family. Only where such details are supplied in the affidavit of the process server would the defendant be in a proper position to rebut the plaintiff's claim as to service or to dispute the legality of the service; and, likewise, would the court be in a position to make a proper finding on the issue as to whether or not there was in fact service; and, if there was any, whether the service, in the manner that it was effected, was in accordance with the law.

I feel that I should also add that just because the provisions of s. 431(1)(c)(i) of the NLC contain the word 'leaving', it cannot be the law that the plaintiff's process server is at liberty to literally leave the Form 16D notice anywhere or anyhow at the address of the defendant in the manner he might have thought permissible, and thereafter to just mention the word 'meninggalkan' in his affidavit of service. It is the duty of this court to ensure that service was done properly and fairly. But how is the court to judge that there has been a proper and fair service if the affidavit of service does not contain a fair amount of information as to how the service was actually done by the process server?

The learned counsel for the plaintiff, in his argument that the statutory declaration constitutes sufficient proof of service, relies on the following cases:

(1) *Amanah Merchant Bank Bhd v. Lim Tow Choon* [1994] 2 CLJ 1;

(2) *TA Securities Bhd v. Ng Yen Ling* [2001] 1 CLJ 102; and

(3) *Asia Commercial Finance (M) Bhd v. Regional Brilliance Sdn Bhd* [2002] 3 CLJ 638.

Cases (1) and (2) are clearly not relevant as the facts there are different. These two cases do not concern the service of Form 16D on the defendant. Nor do they concern s. 431 of the NLC or the mode of service by 'leaving'. They concern service done allegedly by registered post.

In case (3), although it concerns service of Form 16D on the defendant, and although the affidavit of service of the plaintiff, like the present case, merely states that the Form 16D was served by way of 'leaving' it at the defendant's address, the sufficiency of the affidavit of service was not an issue at all, and in fact the method of service (by 'leaving') did not seem to be that important. For, in this case cited, the plaintiff was prudent and thus in terms of service of the Form 16D on the defendant, service by 'leaving' the Form 16D at the defendant's address was not the only course of action taken by the plaintiff. Significantly, unlike the affidavit of service in the present case, the affidavit of service of the plaintiff in that case, went further to state that the Form 16D was also served by the plaintiff on the defendant by way of A. R. Registered post at the defendant's address and the A. R. card with acknowledgement was exhibited in the affidavit. Service by registered post is provided for by s. 431(1)(d) of the NLC.

In the present case, however, I prefer to adopt the approach taken by Mohd Noor Ahmad J (as he then was) in *Labels Specialist Industries Sdn Bhd v. Medal Sports (M) Sdn Bhd* [1997] 3 CLJ 578. This case, cited by the learned counsel for the defendant, concerns the service of a writ on the defendant. The affidavit of service affirmed that the plaintiff left the writ at the defendant's registered address, but the affidavit of service did not elaborate as to how it was served. The learned judge considered the provisions of O. 62 r. 4(1)(a) of the RHC and s. 350 of the Companies Act 1965. Order 62 r. 4(1)(a) provides:

> Where an action is against a corporation, the writ may be served:
>
> (c) by leaving a copy of it at the registered office (if any) of the corporation;

Section 350 of the Companies Act provides:

> A document may be served on a company by leaving it at or sending it by registered post to the registered office of the company.

The learned judge held:

> On the facts, I have to consider the true meaning of the expression "by leaving". *The Concise Oxford Dictionary* 9th edn., defines the verb 'leave' as deposit or entrust (a thing) to be attended to, collected or delivered etc. in one's absence (left a message with his secretary). To my mind, from the definition the expression "by leaving" connotes the need on the part of the person who leaves the thing to take the necessary steps to ensure that the person for whom the thing is left in his absence is made aware of the thing left. That being the case, especially where O. 62 r. 4(1)(a) of the Rules and section 350 of the Act deal with the service of writ/documents on corporation/company, it is incumbent upon the person who effects the service to take the necessary steps to ensure that at least someone in the corporation/company is made aware of the writ/document left thereat. Therefore, the expression 'by leaving' does not mean by simply leaving it there but at least by leaving it at some conspicuous part of the premises of the corporation/company. In other words, by simply leaving a writ/document is different from serving a writ/document by leaving.
>
> One T. H. Tan simply affirmed in the affidavit of service (Encl. (3)) that the amended writ of summons was served on the appellant on 15 December 1993 at 11 a. m. by leaving it at its registered address. He did not elaborate in what manner it was left there so as to ensure that at least someone in the registered office of the appellant could be made aware of the amended writ being left thereat. It is the duty of the respondent to satisfy the Court on the balance of probability that the amended writ had been properly served on the appellant, that is to say, the amended writ was left at the said premises in such a manner that someone in the registered office of the appellant could be made aware of it. In the absence of such proof, it is not the duty of the appellant to prove that the appellant was not aware of the amended writ. In fact, the appellant denied knowledge of such service. As the affidavit of service lacks precision in the manner the amended writ was left at the said premises, I am not satisfied on the balance of probability that the service had been properly effected. Therefore, the service is irregular and the appellant is entitled to have the judgment in default and the order of damages assessed set aside on this ground alone.

In conclusion, I hold that, in the context of the issue before the court:

(a) the governing provision for the service of the Form 16D notice on the chargor/defendant is s. 431(1)(c)(i) of the National Land Code and not section 9.33(4) of the Charge Annexure;

(b) the statutory declaration of the process server is vague and meaningless and cannot be accepted as evidence of service of the Form 16D notice on the defendant;

(c) in law, service of the Form 16D on the defendant is mandatory; and

(d) by reason of (a), (b) and (c) above, the present originating summons is a nullity.

There are other issues in this case, but in the light of the decision that I have just taken on the issue of service of the Form 16D, I do not think that I need to consider them.